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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Construct Solutions, Inc.–Protest and Reconsideration

File: B-405288; B-405288.2

Date: October 11, 2011

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Matthew A. Kelly, Esq., Department of Veterans Affairs, for the agency.

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DIGEST

Protest challenging Small Business Administration's (SBA) denial of certificate of competency (COC) is sustained where the basis for SBA's refusal to issue the COC resulted from SBA's misapplication of its regulations.

DECISION

Construct Solutions, Inc., of Indianapolis, Indiana, a service-disabled veteran-owned small business (SDVOSB) concern, protests the award of contract to Ironclad Services, of Springfield, Massachusetts, by the Department of Veterans Affairs (VA), under invitation for bids (IFB) No. VA-246-11-IB-0060, for roof replacement at a VA facility in Beckley, West Virginia.

We sustain the protest.

BACKGROUND

The VA issued the IFB as a set-aside for SDVOSBs on April 8, 2011, for the replacement of roofs and fascia at a VA facility in Beckley, West Virginia. The contracting officer publicly opened bids on May 10 with Construct being the apparent low bidder.

Following bid opening, the contracting officer investigated Construct's responsibility and eligibility for award. Based on this investigation, the contracting officer determined that Construct had submitted an "unreasonably low" bid, was non-

responsible, and was therefore ineligible for award. On May 11, the contracting officer informed Construct that its bid was rejected due to concerns about its responsibility.

Following the rejection of its bid, on May 16, Construct filed an agency-level protest arguing that the contracting officer improperly rejected its bid as “unreasonably low,” and failed to allow Construct an opportunity to review its bid for potential mistakes in accordance with Federal Acquisition Regulation (FAR) § 14.407-3(g)(5). Construct maintained that, had the contracting officer inquired as to whether there was a mistake in its bid, it would have demonstrated its ability to perform the requirement for its bid price, and thereby addressed the contracting officer’s concerns about responsibility.

On May 28, with Construct’s agency-level protest yet to be decided, the contracting officer sent a request for a certificate of competency (COC) review to the Small Business Administration (SBA), and extended Construct the opportunity to submit a COC application. Evidently, the contracting officer recognized that, as a small business, questions regarding Construct’s responsibility are reserved for SBA review under the COC process. 15 U.S.C. § 637(b)(7) (2006). Construct submitted its application to the SBA on June 10.

The SBA responded by letter dated June 22. The letter explained that SBA would not issue a COC because Construct’s COC application indicated that the firm would not comply with the subcontracting restrictions set forth at 13 C.F.R. § 125.6. As stated by the SBA, this regulation requires firms to perform a minimum of 15 percent of the cost of a contract, exclusive of materials, with their own employees. The SBA’s analysis indicated that Construct’s employees would perform only approximately eight percent of the relevant costs of the contract. Construct disagreed with the SBA’s reasoning, and requested reconsideration of the decision on the basis that the subcontracting restriction cited by SBA was not applicable to SDVOSBs.

Following receipt of the SBA’s refusal to issue the COC, the VA made the award to Ironclad on June 28. We note that at this time, Construct’s agency-level protest had not been decided. In fact, the decision on the agency protest was not issued until June 30, two days after the date of the award to Ironclad. Furthermore, the June 30 agency protest decision sustained Construct’s agency-level protest. Specifically, the decision stated that “[b]ased on our review of the record and communications with the [contracting officer], we have determined that you were improperly excluded from consideration. Accordingly, we are directing the contracting activity to take corrective action by including your bid for consideration.” Agency Protest Decision, at 1.

Notwithstanding the agency-level protest decision, the VA contracting activity took no further action, concluding that no further corrective action was required where the contracting activity had requested a COC from SBA, and SBA had denied the COC prior to the VA’s award decision.

Construct next filed a protest with our Office via e-mail at 5:21 p.m. on July 5, with a copy sent by facsimile transmission that was received at 5:31 p.m., after the 5:30 p.m. Eastern Time close of business set forth in our Bid Protest Regulations. 4 C.F.R. § 21.0(f) (2011). Due to an error by our Office, the subsequent facsimile transmission, as opposed to Construct's earlier e-mail filing, was used to determine the filing date of Construct's protest. In this regard, because the facsimile copy of the protest had been received after 5:30 on July 5, pursuant to section 21.0(f) of our Bid Protest Regulations, we considered the protest to have been filed on July 6.

In its protest to our Office, Construct challenged the SBA's refusal to issue a COC, as reflected in the June 22 letter. Our Office dismissed the protest on July 25, concluding that the protest was not timely filed. Specifically, our Office determined that the challenge to SBA's refusal to issue a COC was required to have been filed by July 5, 10 days after Construct's receipt of SBA's June 22 letter.

On August 2, Construct filed a request for reconsideration of our dismissal decision, in which it argued that its protest of SBA's refusal to issue a COC was timely filed via e-mail at 5:21 p.m. on July 5. Additionally, Construct notified our Office that on July 25, the same day our Office dismissed Construct's protest, the SBA reversed its prior refusal to issue a COC. In a letter to the VA on that date, the SBA stated:

By way of this letter, and pursuant to Section 8(b)(7) of the Small Business Act, as amended, the SBA hereby withdraws its previous decision and letter dated June 22, 2011, in this matter. Upon reconsideration, SBA certifies that the subject small business is competent and responsible to perform the proposal procurement covered by the referenced solicitation . . . In accordance with that same section of the Small Business Act you are required to let the contract for the referenced solicitation to the certified business without requiring it to meet any other requirement of responsibility or eligibility.

SBA Letter, July 25, at 1.

Upon receipt of Construct's August 2 request for reconsideration, we reviewed all e-mail messages received at our e-mail filing address on July 5, and verified that Construct's protest had, in fact, been received via e-mail at 5:21 p.m. on July 5. On that basis, our Office concluded that Construct's initial protest challenging SBA's failure to issue a COC had been timely filed, and should be reopened. In this decision, we both implement our reconsideration of our earlier dismissal of this protest, and address the merits of the initial protest.

ANALYSIS

Construct has alleged that the SBA's initial decision denying the firm's COC request was improper. In this regard, the protester argues that the denial stemmed from SBA's application of an incorrect limitation on subcontracting standard. Although SBA subsequently reversed the initial decision, and granted Construct a COC for this procurement, Construct has not received the award due to the initial COC denial. Because we conclude that the initial COC denial stemmed from SBA's misapplication of its regulations, we sustain Construct's protest on that basis.¹

Under the Small Business Act, 15 U.S.C. § 637(b)(7), agencies may not find a small business non-responsible without referring the matter to the SBA, which has final authority to determine the responsibility of small business concerns.² Joanell Labs., Inc.; Nu-Way Mfg. Co., Inc., B-242415.8, et al., Apr. 15, 1922, 92-1 CPD ¶ 369. With regard to consideration of SBA COC determinations, the Small Business Act gives the SBA the conclusive authority to review a contracting officer's determination that a small business is not responsible. 15 U.S.C. § 637(b)(7). Therefore, our Office does not review challenges to the SBA's decision not to issue a COC unless there is a showing that the COC denial resulted from possible bad faith, or the SBA's failure to follow its own regulations or to consider vital information because of how information was presented to, or withheld from, the SBA by the procuring agency. Bid Protest Regulations, 4 C.F.R. § 21.5(b)(2). In this context, the subject for our review is limited to examining whether SBA applied the correct regulations when it

¹ We solicited the comments of the SBA on this protest. In its response, the SBA maintained that the propriety of the award to Ironclad depended only on whether the award was issued between the date of SBA's refusal to issue a COC on June 22, and its reversal of that decision on July 25. Given that the award was issued on June 28, the SBA argued that the award was proper since the VA had made the award in reliance on SBA's determination that Construct was not eligible to receive a COC. However, because Construct was prejudiced by the SBA's June 22 refusal to issue a COC, timely protested the SBA's action with our Office, and made a showing that the denial of the COC resulted from the SBA's failure to follow its own regulations, our Office has jurisdiction to independently review the SBA's denial of the COC, notwithstanding the award to Ironclad, and we sustain the protest on that basis.

² When the contracting officer originally determined that Construct was non-responsible, the proper course of action was referral of the matter to the SBA. Since the contracting officer ultimately referred the issue of the protester's non-responsibility to the SBA on May 28, it is SBA's subsequent refusal to issue a COC, not the contracting officer's initial non-responsibility determination, which is the subject of review for our Office.

denied Construct a COC. See McNeil Technologies, Inc., B-254909, Jan. 25, 1994, 94-1 CPD ¶ 40.

In order for SBA to issue a COC, a referred company must, preliminarily, demonstrate that it is eligible to apply for a COC. See SBA letter, June 22, at 1. In this case, the SBA concluded that Construct was not eligible. Specifically, the SBA stated that:

SBA regulations require that for any procurement that is set aside for small business, the small business must perform minimum percentage of work with its own employees. This provision, which is included in both SBA's regulations and in the Federal Acquisition Regulation, is known as the "limitations on subcontracting clause." 13 C.F.R. § 125.6; FAR § 19.508(e) and FAR § 52.219-14. The clause requires that you *perform a minimum of 15% of the cost of the contract with your own employees*, not including the cost of materials. Based on the figures provided by Construct Solutions, it proposed to perform about half that, or less than 8%. For that reasons [sic], SBA cannot issue a Certificate of Competency.

Id. (Emphasis added).

The SBA regulation cited in the SBA's June 22 letter, 13 C.F.R. § 125.6, consists of several distinct provisions. As relevant, 13 C.F.R. § 125.6(a), applies to small businesses and requires in part that, "[i]n the case of a contract for general construction, the concern *will perform at least 15 percent of the cost of the contract with its own employees* (not including the costs of materials)." Id. at § 125.6(a)(3) (emphasis added). This provision, the requirements of which were cited in SBA's refusal to issue the COC, does not, however, apply to SDVOSBs. Rather, the subcontracting limitations forth in 13 C.F.R. § 125.6(b) apply to SDVOSBs and establish a less stringent subcontracting threshold. Specifically, the regulation states that an SDVOSB prime contractor can subcontract a portion of the work, provided that "[i]n the case of a contract for general construction, the [SDVOSB] spends at least 15% of the cost of contract performance *incurred for personnel on the concern's employees or the employees of other* [SDVOSBs]." Id. at § 125.6(b)(2) (emphasis added). Construct asserts that when analyzed under the appropriate standard, its COC application demonstrates that 26.21 percent of the work will be performed by its employees or the employees of another SDVOSBC.

In sum, the record reflects that SBA incorrectly applied the limitation on subcontracting found at 13 C.F.R. § 125.6(a), to Construct, a SDVOSB subject to the limitation on subcontracting at 13 C.F.R. § 125.6(b). We therefore sustain the protest where SBA refused to issue a COC to Construct due to failure to properly follow its own regulations.

RECOMMENDATION

Where our Office has sustained a protest of the SBA's refusal to issue a COC, we have recommended that the procuring agency resubmit the matter of the small business firm's responsibility to SBA for further consideration. See COSTAR, B-240980, Dec. 20, 1990, 90-2 CPD ¶ 509. In that context, we have also further recommended that, if the SBA should issue a COC on behalf of the firm, that the agency should then take corrective action up to and including changing the award decision. For example, in COSTAR, supra, our Office recommended that, if the SBA issued a COC to the protester, the agency should terminate a previously awarded contract under the solicitation for convenience of the government and make a new award to the protester.

In the current protest, as noted above, the SBA has acknowledged that its initial refusal to issue a COC to the protester was in error, and has issued Construct a COC related to this procurement. SBA Letter, July 25, at 1. Therefore, we conclude that the appropriate remedy in this protest, as in COSTAR, is to recommend that the agency terminate the award to Ironclad and make a new award to Construct. We also find that Construct is entitled to recover its costs of filing and pursuing the protest, including reasonable attorney's fees. 4 C.F.R. § 21.8(d)(1). Construct should submit its claim for such costs directly to the VA within 60 days.

The protest is sustained.

Lynn H. Gibson
General Counsel